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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 122

LILLEY CORNETT, - - - - - - Petitioner,

versus

SWIFT COAL & TIMBER COMPANY,
C. S. LANDRUM, and
AMERICAN COLUMN & LUMBER COMPANY, - Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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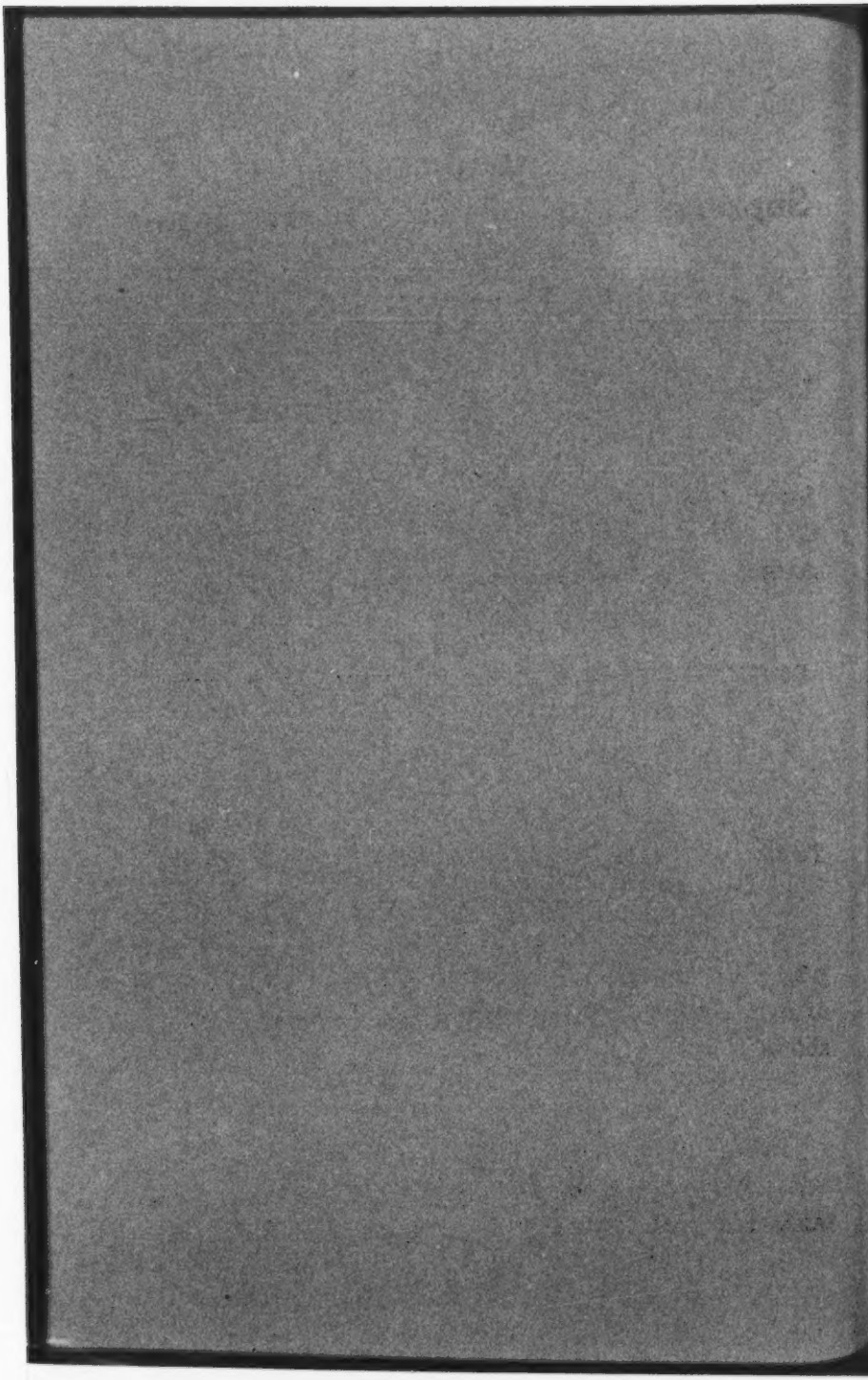

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LILLEY CORNETT, - - - - - - - *Petitioner,*

v.

SWIFT COAL & TIMBER COMPANY,
C. S. LANDRUM, AND
AMERICAN COLUMN & LUMBER COMPANY, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Lilley Cornett, comes now and complaining of an order of the United States Circuit Court of Appeals for the Sixth Circuit, entered April 9, 1940, shows:

I.

In Kentucky by Ky. Stat., Sec. 4052, all property is assessable for taxation as of July 1st, of every year for taxes due the following year. For instance, for taxes

due in 1940, the assessment is as of July 1, 1939. This is true although the assessment may be actually made at a later date.

II.

By Ky. Stat., Sec. 4021, a lien attaches to all assessable property in favor of the State of Kentucky and the county where situate, as of July 1st of each year, the date of assessment.

III.

The learned District Court for the Eastern District of Kentucky, so bound as matter of law (Tr. 15), and by the order hereafter referred to in paragraph XIV, the learned United States Circuit Court of Appeals for the Sixth Circuit affirmed that finding.

IV.

On July 1, 1930, American Column & Lumber Company, hereafter referred to as "Lumber Company," was the owner of 29 parcels of land in Letcher County, Kentucky, aggregating in area nearly 50 acres, which were assessed for taxation as of that date at $5,000.00, and to which a lien then attached to secure payment on or before December 31, 1931, of the taxes levied in 1931.

V.

At that time there were no other liens of any sort against said lands.

VI.

The Lumber Company failed to pay the taxes assessed for the year 1931, on or before December 31, 1931, and on March 7, 1932, proceeding under authority of Ky. Stat., Sec. 4149, the Sheriff of Letcher County, finding no personalty, exposed said lands for sale at the front door of the Court House in Whitesburg, Kentucky, when Lilley Cornett became the purchaser thereof at the price of the taxes due, interest, penalties, cost and commission. Cornett notified said Lumber Company of his purchase, and the lands not having been redeemed within two years, on March 14, 1932, the then Sheriff of Letcher County executed to Cornett a deed to part of these lands, and later a deed to the remainder which had been omitted from the first deed by oversight.

VII.

The validity of this deed was before the Court of Appeals of Kentucky in Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127, and was there upheld as a valid conveyance to Cornett of the fee simple title to these lands.

VIII.

The District Court for the Eastern District of Kentucky and the United States Circuit Court of Appeals for the Sixth Circuit, refusing to follow and apply the law of Kentucky held that the only right which petitioner had was a paramount lien against the lands to

reimburse him for the amount he had paid the Sheriff of Letcher County when he purchased at the tax sale and held this lien was not superior to the lien of Swift, although the lien of Swift was acquired twenty-two days after the tax lien had attached to these lands.

IX.

On July 1, 1930, there was pending in the District Court for the Eastern District of Kentucky at Lexington, suit in equity No. 543, styled Swift Coal & Timber Company, hereinafter called "Swift," Complainant v. American Column & Lumber Company, Defendant, in which complainant sought *inter alia* to recover over $200,000.00 in damages for non-performance of a contract. On July 22, 1930, said complainant filed in the District Court an amended bill, and an affidavit of one Burton by which it sought and procured an attachment against said defendant's property for the sum of $23,000.00. Said attachment was on July 23, 1930, levied on said lands by the Marshal of the Eastern District of Kentucky. Said attachment issued 21 days after said tax lien attached, and was levied 22 days thereafter.

X.

Neither the amended bill nor the affidavit mentioned authorized the issuing of an order of general attachment because neither document contained a sufficient compliance with the provisions of Sec. 196, Ky. Code of Civil Procedure, especially in this that neither con-

tained any allegation of any specific amount that said complainant believed it ought to recover from said defendant, and this was fatal to the jurisdiction of the Court to proceed under said attachment under repeated decisions of the Court of Appeals of Kentucky, among which are:

(a) Worthington v. Cary, 1 Met. 470.
(b) Moore v. Harrod, 101 Ky. 248, 40 S. W. 675.
(c) Hart County Deposit Bank v. Hatfield, 236 Ky. 725, 33 S. W. (2d) 660.
(d) Howard v. Howard, 239 Ky. 160, 39 S. W. (2d) 245.
(e) Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127.

XI.

Conformably to U. S. Rev. Stat., Sec. 915, 17 Stat. at L. 197, 28 U. S. C. A., Sec. 726, the District Court for the Eastern District of Kentucky had adopted by Rule 54 the provisions of the Kentucky Statutes, relating to attachments and hence said Court was bound to follow such statutes as construed by the Court of Appeals of Kentucky, in dealing with or assuming jurisdiction of attachment proceedings.

XII.

As said statutes are construed and applied by the Court of Appeals of Kentucky, the District Court for the Eastern District of Kentucky never acquired jurisdiction to either issue or sustain said attachment, or to entering order of sale thereon.

XIII.

On December 31, 1931, the District Court for the Eastern District of Kentucky sustained said attachment, and on December 17, 1932, entered an order vacating a portion of former orders. On the last named date said suit No. 543 disappeared from the docket of the said District Court, and was not carried on said docket any further, and no other steps or proceedings were taken by the said Swift Coal & Timber Company to enforce said attachment until April 17, 1937, when Swift filed a motion to redocket said suit No. 543, resustaining said attachment and ordering a sale of said lands to satisfy its judgment against the Lumber Company.

XIV.

The District Court for the Eastern District of Kentucky, on May 5, 1937, sustained said motion *in toto*. Petitioner had no notice thereof, and on June 7, 1937, instituted in said District Court suit in equity No. 900 against respondents to restrain any sale of these lands upon these grounds:

(a) That the lien under which he acquired title was superior to that claimed by Swift.

(b) That Swift's attachments were void.

(c) That Swift had been guilty of culpable laches amounting to an abandonment of its attachments if it ever had any.

XV.

Said District Court held that although the tax lien was prior to that of Swift, petitioner's rights began at the time of the tax sale, and not at the date of assessment, and that therefore petitioner was entitled only to a paramount lien for the amount he had paid the Sheriff with interest; that Swift's attachment was valid; and that Swift had been guilty of no laches, and entered a decree accordingly, June 22, 1939.

XVI.

Petitioner carried said case to the United States Circuit Court of Appeals for the Sixth Circuit, and that Court on April 9, 1940, without delivering any opinion, entered the following order:

"Before Hicks, Allen and Hamilton,
Circuit Judges.

This case was heard upon the transcript, briefs and argument of counsel, and it appearing that the District Court did not err in deciding that the purchaser at a sheriff's sale by virtue of the tax sale and deed from the sheriff takes the land subject to liens existing at the time of sale (Hall v. Hall, 174 Ky. 354; Smith v. Young, 178 Ky. 376; Drane v. Graves, 261 Ky. 787); and the record presenting no reversible error, it is ordered and adjudged that the judgment of the District Court entered on June 22, 1939, herein appealed from, be and the same is in all things affirmed.

Approved for entry:

(S) Florence E. Allen,
Circuit Judge."

Filed: April 9, 1940.

XVII.

By said order said Circuit Court of Appeals ignored entirely and refused to follow the law of Kentucky, with reference to

(a) The rights of prior lien holders.
(b) Jurisdictional validity of attachment proceedings, and
(c) Culpable laches

and the Kentucky cases cited in said order as supporting it are all either against the position of the Court or have no reference whatever to the position taken, and said order contains on its face grave error affecting the substantial rights of petitioner.

Wherefore, the premises considered, to the end that the manifest errors appearing in the order of said Circuit Court of Appeals, and in the decree of said District Court may be reviewed and corrected petitioner prays a writ of certiorari to said Circuit Court of Appeals directing that a certified copy of the record and proceedings in said case No. 8368 lately pending in said Court wherein Lilley Cornett was appellant and Swift Coal & Timber Company, *et al.*, were appellees, be transmitted here for review.

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Of Counsel.

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LILLEY CORNETT, - - - - - *Petitioner,*

v.

SWIFT COAL & TIMBER COMPANY, ET AL., *Respondents.*

BRIEF FOR PETITIONER.

If This Honorable Court Please:

This is an application for a writ of certiorari to review a judgment of the *United States Circuit Court of Appeals* for the *Sixth Circuit* filed and entered April 9, 1940, (45)[1], which affirmed a judgment of the *District Court* for the *Eastern District* of *Kentucky* rendered June 22, 1939 (17-20).

JURISDICTION.

The jurisdiction of this *Court* is invoked under *Sec. 240 (a)* of the *Judicial Code (Act of February 13, 1925, 43 Stat. at L. 936, 28 U. S. C. A., Sec. 240 (a))*:

(a) Because the judgment of the *Sixth Circuit* ignores and refuses to apply and give effect to the

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[1]Figures in parentheses refer to pages in the transcript.

settled law of the State of Kentucky respecting the superiority of tax liens over other liens subsequently acquired.

(b) Because the judgment of the *Sixth Circuit* ignores and refuses to give effect to the settled law of Kentucky respecting the essentials of jurisdiction to determine attachment proceedings.

(c) Because by its refusal to follow and apply the laws of Kentucky in the respects mentioned the *Sixth Circuit* has deprived petitioner of property without due process of law contrary to the *Fifth Amendment* to the *Constitution* of the *United States.*

THE FACTS.

This is a contest over the ownership of a small fraction, less than 50 acres of land, in Letcher County, Kentucky (7, 26, 40). On July 1, 1930, these lands were owned by the American Column & Lumber Company, an Ohio corporation, hereinafter called "Lumber Company" (10, 25), which had purchased them to serve as a right-of-way for a railroad over which to remove timber (7, 26).

As of that date—July 1, 1930,—these lands were accountable to Kentucky and Letcher County for tax assessment for State and County taxes due in 1931. (See *Ky. Stat., Sec. 4052.* Appendix *post,* p. 24.) The learned *District Court* for the *Eastern District of Kentucky* so found (15), and the judgment of the *Sixth Circuit* (45), finds no fault with that conclusion. These lands were the only property of any sort of any

intrinsic taxable value owned by the Lumber Company in Letcher County (8, 40, and see *Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127*). Taxes assessed as of July 1, 1930, were payable on or before December 31, 1931 (9).

By statute in Kentucky all taxable property is impressed with a lien as of July 1st, the date for assessment, to secure payment of the taxes due. (See *Ky. Stat., Sec. 4021,* Appendix *post,* p. 23). This lien attached as of July 1st, regardless of the actual date of assessment, and the learned *District Court* so found (15). The learned *Sixth Circuit* likewise finds no fault with that holding (45).

The Lumber Company failed to pay these taxes when due (30), and the then Sheriff of Letcher County on March 7, 1932, proceeding under *Ky. Stat., Sec. 4149* (Appendix *post,* p. 24), proceeded to advertise these lands for sale and to sell them at the front door of the Court House at the County site to satisfy the tax lien (9, 30). At that sale petitioner became the purchaser of the lands at the price of the taxes due, interest, penalties and cost (9).

At that time the Lumber Company had two years to redeem these lands by paying petitioner what he had paid plus interest (see *Ky. Stat., Sec. 4151-2,* Appendix *post,* p. 25),[2] but it made no effort to redeem (30) and the redemption period having expired on March 19, 1934, the then Sheriff of Letcher County, following

[2]Later than this tax sale the General Assembly of Kentucky extended the period of redemption to five years, but as to the sale in question this extension did not apply. *Greib v. National Bank of Kentucky's Receiver, 252 Ky. 753, 68 S. W. (2d), 21 at 24.*

the mandate of *Ky. Stat., Sec. 4159* (Appendix, *post*, p. 26), executed and delivered to petitioner a deed to these lands (30), which was immediately recorded.

The regularity of this tax sale and the title acquired by petitioner under his deed have been before the *Court of Appeals of Kentucky* in *Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127*, and applying law to facts the sale was there declared regular and the title under the deed to be a fee simple title.[3]

In 1928 Swift Coal & Timber Company hereafter called "Swift" for brevity, instituted in the *District Court* for the *Eastern District of Kentucky*, suit in equity No. 543, which sought *inter alia* to recover from the Lumber Company exceeding $200,000.00 in damages for breach of certain contracts (26). On November 14, 1930, it had judgment for $11,760.50 and on December 31, 1931, judgment for $20,450.27 (29). This was the full extent of recovery.

July 22, 1930, twenty-one days after the tax lien attached, Swift procured from the Clerk of the *District Court* a general attachment against the property of the Lumber Company alleging that notwithstanding the Lumber Company was indebted to it in the sum of $249,812.43, it ought to recover at least $204,552.39, and only wanted to attach for $23,000.00 (26-28). This attachment was issued on an amended bill and affidavit on which no process ever issued (26-28). As we shall clearly show hereafter neither the amended bill nor the

[3]By the doctrine of *stare decisis* the same view must obtain wherein this sale and deed are questioned. *Carroll v. Carroll, 16 How. 275, 14 L. Ed. 936.*

affidavit authorized the granting of an attachment, and therefore the levy of the attachment created no lien and conferred on the *District Court* no jurisdiction to deal with the *res* levied on under this process.

July 23, 1930, twenty-two days after the impressment of the tax lien, the Marshal for the Eastern District of Kentucky levied this attachment against these lands (29). December 31, 1931, the *District Court* sustained the attachment (29). December 17, 1932, the *Court* entered an order vacating certain prior orders adjudging priorities which had been entered September 2, 1931 (30). This order of December 17, 1932, was the last order ever entered in suit No. 543, until May 5, 1937 (12)—a space of four years, four months, twenty-three days—when on a motion filed April 17, 1937, the *District Court* redocketed the case, resustained the attachment of Swift, and reordered a sale of these lands (12), appointing respondent Landrum its Special Master to make the sale.

June 7, 1937, petitioner instituted suit in equity No. 900 (33), in the *District Court* to restrain the execution of the order, on the grounds:

(a) That his tax lien was superior to all liens subsequently acquired.

(b) That Swift's attachment was void *ab initio.*

(c) That Swift had been guilty of such laches as created an abandonment of its attachment.

Suits 543 and 900 were consolidated (33), and tried and the learned *District Court* ruled against positions

(a) and (b) and absolved Swift as to position (c) (2-7; 17-20). The case was appealed to the *Sixth Circuit Court of Appeals* and that *Court* on April 9, 1940, on the facts stated, which are uncontradicted, refused to deliver an opinion and contented itself with the judgment appearing on page 45 of the transcript. We confidently say that the cases *Hall v. Hall, 174 Ky. 356,* and *Drane v. Graves, 261 Ky. 787,* do not support the judgment and that *Smith v. Young, 178 Ky. 376,* has no bearing on the question presented. We further say with confidence that the *Circuit Court of Appeals* could not have written an opinion in this case without reversing it.

SYNOPSIS OF ARGUMENT.

We propose to argue:

(a) That under the law of Kentucky a lien is impressed on all taxable property in a county as of July 1st of every year, to secure taxes payable the following year. That this lien is superior to all liens subsequently acquired, and paramount over all antecedent liens.

(b) That an affidavit for an attachment in Kentucky which does not conform strictly to *Ky. Civil Code, Sec. 196,* will not authorize or support an attachment, and that all proceedings *via* attachment, where the affidavit is defective, are void and create no lien.

(c) That where the law of a state is well settled by decision, if a *Federal Court* in that state refuse to give

that law effect, the result is equivalent to a deprivation of property without due process in violation of the *Fifth Amendment* to the *Constitution.*

ARGUMENT.

I.

All property taxable in Kentucky is valued and assessed for taxation as of July 1st, of each year for taxes due the following year.

(a) Ky. Stat., Sec. 4052 (Appendix, p. 24).
(b) District Court's 12th Conclusion of Law (Tr. 15).

And on all taxable property the State and county acquire a lien to secure the payment of such taxes, which attaches of July 1st, regardless of the actual date of assessment.

(a) Ky. Stat., Sec. 4021 (Appendix, p. 23).
(b) Allin v. Harrodsburg, 247 Ky. 360, 57 S. W. (2d) 45 at 49.
(c) District Court's 13th Conclusion of Law (Tr. 15).

The learned *District Court* for the *Eastern District of Kentucky* found as matter of law that all property in Kentucky was assessable for taxation as of July 1st of each year regardless of the actual date of assessment (*Conclusion of Law No. 12, Tr., p. 15*). This, of course, was a holding that an assessment made later than July 1st, retroacted so as to be operative as of July 1st. In the very nature of things that holding was sound for in taxation there must be a uniform

date of assessment, valuation and payment. This conclusion was compelled by the provisions of *Ky. Stat., Sec. 4052.* (See Appendix, p. 24, *post.*)

The *District Court* also concluded as matter of law that the State and County had a lien to secure payment of these taxes, and that this lien attached as of July 1st, the date for assessment, regardless of the actual date when the property might be assessed (*Conclusion of Law No. 13, Tr., p. 15*). This conclusion was based on the provisions of *Ky. Stat., Sec. 4021.* (See Appendix, p. 23, *post.*) In the *Circuit Court of Appeals,* respondents said nothing to the contrary, and the judgment of that Court (45) must be taken as approving that holding.[4]

All this as we have said, is admitted. It is also admitted that on July 1, 1930, the Lumber Company was the owner of these lands, and that they were the only property of any taxable value which the Lumber Company then or ever owned in Letcher County of taxable value. This latter fact has been judicially determined (*Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127*).

If these things are true and the *District Court* and the *Circuit Court of Appeals* are correct in Conclusions of Law 12 and 13 (45), then the initial error of these *Courts* is apparent, since it is admitted that on July 1, 1930, there were no liens against these lands except this tax lien.

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[4]*Cf. Allin v. Harrodsburg, 247 Ky. 360, 57 S. W. (2d) 45, 49; Hicks v. Kimbrow, 225 Ky. 778, 10 S. W. (2d) 290; C. St. L. & N. O. Ry. Company v. Commonwealth, 115 Ky. 278, 72 S. W. 1119.*

II.

The tax lien is fixed by statute. It takes priority over any lien subsequently acquired. If it is extinguished by foreclosure and the property is not redeemed, all subsequent liens are extinguished.

(a) Rankin v. Scott, 12 Wheat. 177, 6 L. Ed. 592.

(b) Schmidtman v. Atlantic Phosphate, etc., Corporation, 230 Fed. 769, 145 C. C. A. 79.

(c) Hall v. Hall, 174 Ky. 356, 192 S. W. 76.

(d) Faust v. Louisville Trust Company, 192 Ky. 3, 232 S. W. 58.

(e) Drane v. Graves, 261 Ky. 787, 88 S. W. (2d) 927.

It is general law that in regard to priorities the lien which is elder prevails (*Rankin v. Scott, 12 Wheat. 177, 6 L. Ed. 592; Schmidtman v. Atlantic Phosphate, Etc., Corporation, 230 Fed. 769, 145 C. C. A. 79*). The senior lien must be given first consideration. There is no force in a contention that a tax sale is no fit place for the marshalling of liens. Under the law of Kentucky, the lien continues for a space of two years during which time the land may be redeemed from the tax sale and the lien extinguished. If at any time during that time those claiming other liens desire to redeem from the tax sale they may do so (*Ky. Stat., Sec. 4032*), and not only may they do so, but it is their duty to redeem (*Eblen v. Major, 147 Ky. 144, 143 S. W. 748*). Having both the right and duty to redeem if they sit by and allow the period of redemption to pass, their liens are extinguished and the sheriff of the county must convey the purchaser at the tax sale the

lands sold (*Ky. Stat., Sec. 4159*) and by that deed the purchaser acquires such title to the property as the taxpayer had at the date of assessment, and nothing more (*Johnson v. McIntire, 1 Bibb, 295; Bradley v. Sears, 138 Ky. 230, 127 S. W. 782; White v. McIntosh, 145 Ky. 59, 139 S. W. 1057; Rogers v. McAlister, 151 Ky. 488, 152 S. W. 571; Dowell v. Hallowell, 173 Ky. 543, 191 S. W. 315; Smith v. Young, 178 Ky. 376, 198 S. W. 1166*).[5]

Any other holding does not comport with the law of Kentucky as laid down by the Court of Appeals in the case of Hall v. Hall, 174 Ky. 356, 192 S. W. 76, cited by both the learned *District Court* and the learned *Circuit Court of Appeals* as supporting their judgments. In that case a mortgage had been executed by "A" to "B" conveying certain land. After the execution of the mortgage, the lands were assessed for taxes, the taxes were not paid and the lands were sold in satisfaction of the tax lien. In a contest between the mortgagee and the purchaser at the tax sale (who had subsequently obtained a deed to the lands) the tax sale purchaser contended that his tax title was superior to everything else, including the mortgage. The *Court* was explicit in setting out just what the question before it was. Its language in this respect was this:

> "The question presented for decision by the appeal is, Does a sheriff's deed conveying to the purchaser real estate, sold by that officer for a tax

[5]The last case cited, *Smith v. Young*, is one of the cases cited and relied on both by the District Court and the Circuit Court of Appeals. That case only holds that the purchaser takes such title as the taxpayer had.

due thereon, extinguish *a legally acquired lien in favor of a third party, created upon the property before its assessment* and existing at the time of such sale and when the deed was executed?" (Italics ours.)

The Court then determined that under the rule that the tax sale purchaser took such title as the taxpayer had at the date of the assessment, and since the taxpayer's title was encumbered at that time the purchaser also took the title encumbered; that his purchase was paramount to everything but not superior, and that he was entitled to his money back with interest, before any other claims were satisfied, or any other title vested.

Now if the mortgage in *Hall v. Hall, supra, had* been executed *after* the assessment of this property instead of *before,* it is clear that the ruling would have been that the tax lien was superior to the mortgage lien, and that there having been no redemption, the fee simple title passed by the tax deed.

To the same effect, under identical circumstances are *Faust v. Louisville Trust Company, 192 Ky. 193, 232 S. W. 58,* and *Drane v. Graves, 261 Ky. 787, 88 S. W. (2d) 927.*

The statute (*Ky. Stat., Sec. 4021*) declares that the tax lien shall attach as of the date of assessment, and by *Ky. Stat., Sec. 4052,* the date of assessment is fixed as of July 1st. In view of these statutes lands are not assessable as of any other date, nor does the lien attach at any other time. Assessments and liens are

not bodies floating in the air and settling at different times and places, but the times of their inception is immutably fixed by statute.

We think, therefore, that the learned *District Court* and *Circuit Court of Appeals* were in error when they decided that a lien which attached on July 23d was superior to one that was fixed on July 1st.

III.

An attachment issued on an affidavit which does not strictly follow the provisions of *Sec. 196, Ky. Code of Civil Practice* is void and service creates no lien.

(a) Worthington v. Cary, 1 Met. 470.

(b) Moore v. Harrod, 101 Ky. 248, 40 S. W. 675.

(c) Hart County Deposit Bank v. Hatfield, 236 Ky. 725, 33 S. W. (2d) 660.

(d) Howard v. Howard, 239 Ky. 160, 39 S. W. (2d) 245.

(e) Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127.

And the laws of attachment of Kentucky have been adopted as the guide in such proceedings for the District Court for the Eastern District of that State.

(a) Rule 54, District Court for the Eastern District of Kentucky.

The attachment under which Swift claims a superior lien was issued on an amended bill and an affidavit to be found on pages 26 and 28 of the transcript. The search for this process was made under allegations in each of these papers which are identical in both.

These allegations which were designed to meet the essential requirements of the *Code* are (in part):

> "Plaintiff ought to recover a sum greatly in excess of defendant's property in this state, to-wit: the sum of *at least* $204,552.39, but that plaintiff claims the right only to an attachment for $23,000.00." (Italics ours.)

The amended bill (28), verifies its allegations on belief that they are true. The affidavit is a flat verification (27). In neither instance is the allegation good and putting them both together they are still fatally defective.

Ky. Code of Civil Practice, Sec. 196, is as follows:

> "An order of attachment shall be made by the clerk of the court in which the action is brought or pending, in any case mentioned in Section 194, subsections 1 and 2, if an affidavit of the plaintiff be filed in his office, showing—
>
> 1. The nature of the plaintiff's claim.
> 2. That it is just.
> 3. The sum which the affiant believes the plaintiff ought to recover; and
> 4. The existence of any of the grounds for an attachment mentioned in subsections 1 and 2 of Section 194; or, in the case mentioned in subsection 3 of Section 194, if it be shown by such affidavit, or by the return of the sheriff upon the order for the delivery of the property claimed, that the facts mentioned in that subdivision exist."

and in *United Collieries v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A. L. R. 961,* the *Court* said:

> "The proceeding in garnishment is special and statutory, affording a harsh remedy, and one pursuing it must bring himself with the statute and follow its mandates. The steps are outlined for vesting the court with jurisdiction over the person of the garnishee and the property in his hands belonging to the principal defendant. It is generally held that these provisions are jurisdictional and unless they have been strictly complied with the Court has no authority to proceed."

and again in *Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127,* the *Court* said:

> "As will appear from the cases cited, this court is unalterably committed to the rule that a strict compliance with the provisions of Section 196 of the Code is essential to the validity of the attachment or proceedings under it. The reason for the rule is that the remedy afforded the creditor is purely statutory and is harsh and extraordinary in that it dispossesses defendant of his property in advance of adjudication of his rights."

How well the *Court* has lived up to these requirements may be gathered from a consideration of the affidavit and amended bill. Taking first the amended bill (27-28), its verification is that its allegations are true as Burton believes. Its force therefore is that the affiant (who could properly verify) believed that the nature of Swift's claim was so and so, believed that it was just and believed that he believed that Swift ought

to recover at least a certain sum. Certainly this amended bill did not authorize the issual of an attachment. (See *Taylor v. Smith, 17 B. Mon. 542, Bailey v. Bendles, 7 Bush, 383, Frick v. Lantz, 199 Ky. 354, 251 S. W. 196, Coloras v. Allen Motor Company, 242 Ky. 93, 45 S. W. (2d) 809, Garnett v. Oliver, 242 Ky. 25, 45 S. W. (2d) 808, Kengreen Gas Utilities Corporation v. Crozier, 244 Ky. 440, 51 S. W. (2d) 262, Daffron v. Smock, 247 Ky. 98, 56 S. W. (2d) 712, United Collieries Company v. Martin, 248 Ky. 808, 60 S. W. (2d) 125, 89 A. L. R. 971*).

We may therefore lay aside the amended bill as giving vitality to Swift's claimed attachment.

Coming now to the affidavit it does set out the nature of Swift's claim, and that it is just, but as to Burton's belief about the amount he believes Swift ought to recover from the Lumber Company it is as follows:

> "Plaintiff ought to recover a sum greatly in excess of the value of defendant's property in this state, to-wit; the sum of *at least* $204,552.39, but that plaintiff claims the right only to an attachment for $23,000.00." (Italics ours.)

That, under the *Kentucky Code*, is not sufficient. The requirement that the attaching creditor shall reveal clearly the sum he believes he ought to recover from a defendant is simple, easily complied with, and is designed to exhibit his good faith in his claim. He might, for instance, sue for $1,000.00, when a search of his conscience would not lead to a belief that he ought

to recover that sum. The *Courts* of Kentucky have been insistent on strict compliance with that *Code* provision.

In *Worthington v. Cary, 1 Met. 470,* the *Court* said:

> *"But both the affidavits are silent as it respects the nature or justice of the plaintiff's claim, or the amount he believed he was entitled to recover in the action. This* defect in the affidavit is fatal to the validity of the attachment, and to all proceedings *under it.* The remedy is a summary one, and a party can entitle himself to it only by a strict compliance with the terms prescribed by law. In Taylor v. Smith, 17 B. Mon. 536, it was held that it was fatal that the affidavit did not state that plaintiff's claim was just." (Italics ours.)

In *Moore v. Harrod, 101 Ky. 248, 40 S. W. 675:*

> "There is, however, no attempt, beyond a statement of the grounds of attachment, to conform to the requirements of section 196, of the Code; which, in addition, requires the affidavit to show (1) the nature of the plaintiff's claim; (2) that it is just; (3) the sum which the affiant believes the plaintiff ought to recover. If, therefore, we hold that the nature of the claim is sufficiently set out, still there is no averment that the claim is just, *and no statement in terms of the sum affiant believes the plaintiff ought to recover. This court has held several times that a failure to so state is fatal and this although the petition is upon a note for a given sum which is alleged to be due and unpaid."* (Italics ours.)

In *Hart County Deposit Bank v. Hatfield, 236 Ky. 725, 33 S. W. (2d) 660:*

> "It is the rule that the omission of the affidavit for an attachment to state that the claim is just is fatal to the lien. Frick & Lindsay v. Lantz & Ogden, 199 Ky. 354, 251 S. W. 196. *The same rule necessarily applies when the affidavit omits to state the sum which the affiant believes the plaintiff ought to recover.* * * * It is apparent therefore that the defective affidavit did not furnish the basis for a valid attachment lien." (Italics ours.)

In *Howard v. Howard, 239 Ky. 160, 39 S. W. (2d) 245:*

> "Error 2, *supra,* was before us for determination in the very recent case of Hart County Deposit Bank v. Hatfield, 236 Ky. 725, 33 S. W. (2d) 660, 662, and in which we held that the failure of the affidavit for the attachment to state 'the sum which the affiant believes the plaintiff ought to recover,' as contained in subsection 3 of section 196 of the Civil Code of Practice, was fatal to the attachment and gave to the plaintiff no lien on any property that might be levied on thereunder."

In *Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127,* the affidavit for the attachment contained this after setting out the amount of claim:

> "There are no set-offs or counterclaims in favor of the defendant against the same."

And the Court said:

> "Looking to the grounds for attachment above set out, it will be found that there is no statement

in words or in terms 'the sums which the affiant believes he ought to recover'; therefore, in harmony with the established rule from which we see no reason to recede, we are constrained to hold that the affidavits for attachments were fatally defective and therefore the attachments and subsequent proceedings under them were void."

Notwithstanding this plain statutory requirement, and the decisions of the Court of Appeals of Kentucky commanding a strict compliance, and the fact that they are bound by these decisions (*Loewe v. Savings Bank of Danbury, 226 Fed. 444, 149 C. C. A. 496, 242 U. S. 357, 37 Sup. Ct. Rep. 172, 61 L. Ed. 360; Gumble v. Pitkin, 124 U. S. 131, 8 Sup. Ct. Rep. 379, 31 L. Ed. 374; Flietas v. Cochrem, 101 U. S. 301, 25 L. Ed. 954; People's Savings Bank v. Batchelder Egg, etc., Company, 51 Fed. 130, 2 C. C. A. 126; Rice v. Adler Goldman Commission Company, 71 Fed. 151, 18 C. C. A. 15*), the learned District Court and the *Circuit Court of Appeals* have ignored them and decided that an affidavit which wobbled around between decision and indecision supported an attachment, and conferred jurisdiction to deal with the *res*. That affidavit in no sense accorded with the Code requirement. The Code did not require that the affidavit state at least the amount which the affiant believed he ought to recover, but the amount itself.

We think, therefore, the learned Circuit Court of Appeals was in error.

IV.

The case of Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127.

That case was a contest between petitioner and three law firms over the title of petitioner to this land under his sheriff's tax deed. Two questions were presented and decided. (a) The validity of petitioner's tax deed. (b) The validity of attachments issued to the three law firms July 22, 1930, and levied on this land July 23, 1930. The *Court of Appeals of Kentucky* decided (a) that petitioner's tax deed was perfectly valid and passed the fee simple title, and (b) that the attachment of the three law firms were void *ab initio* because they had not complied strictly with *sec. 196* of the *Kentucky Code of Civil Practice.*

While this case may not be *res adjudicata,* it is certainly *stare decisis,* and entitled to recognition under that doctrine. The question argued in Sections I and II of this brief *ante* was not before the Court apparently, or if it was, the Court found it unnecessary to decide it.

V.

Where a Federal Court sitting in a State refuses to apply the law of the State, its action amounts to a deprivation of property without due process of law.

The law of each state in the Union is the fundamental law of the land so far as that state is concerned, and the *Federal Courts* sitting in that state are bound to follow and apply its laws (*Erie Railroad Company v.*

Tompkins, 304 U. S. 64, 58 Sup. Ct. Rep. 817, —— *L. Ed.* ——). If they fail to do so they have failed to accord the losing litigant due process of law in violation of the *Fifth Amendment* (*Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 Sup. Ct. Rep. 56, 41 L. Ed. 369*).

That is what has happened in this case. The laws of Kentucky are plain as to dates of assessment and liens, and as to jurisdictional validity of attachments. If they be not followed, then we have not been accorded due process of law by the *Federal courts* sitting in and for Kentucky.

CONCLUSION.

We respectfully ask a certiorari, and a reversal.

CLEON K. CALVERT,
Attorney for Petitioner.

C. W. NAPIER,
C. W. NAPIER, JR.,
Of Counsel.

Pineville, Ky.,
May 27, 1940.

APPLICABLE SECTIONS KENTUCKY STATUTES.

SEC. 4021: The Commonwealth, and each county, incorporated city, town or taxing district, shall have a lien on the property assessed for the taxes due them respectively (for five years) which shall not be defeated by gift, devise, sale, alienation, or any means whatever, unless the gift, devise, sale or alienation shall have been made for more than five years before the institution of proceedings to enforce the lien, and nothing shall be exempt from levy and sale for taxes and cost incident to the sale. When any lands or improvements shall not be assessed retrospectively in the manner provided for by law, for that year, at any time not later than five years thereafter; but the lien thereby accruing shall not prejudice the rights of purchasers acquired in the meantime.

SEC. 4030: In all suits and controversies involving the titles of lands claimed or held under the deed executed by the sheriff in pursuance of the sale for taxes, the deed shall be prima facie evidence of the regularity of the sale and of all prior proceedings and title in the person to whom the deed has been executed.

SEC. 4032: Any person having a lien on property upon which the owner has failed to pay the taxes, and has become delinquent, such lien holder may pay the taxes, interest and penalties thereon and shall be subrogated to the lien of the Commonwealth, county or district therefor, and the sum so paid shall bear legal interest from the date of payment, and shall be collectible in the same manner as the original claim of the lien holder.

SEC. 4042a-13: The value fixed and the amount of property assessed by each taxpayer shall be the

value and amount fixed as of the first day of July in each year.

SEC. 4052: All taxable estate shall be assessed and valued as of the first day of July in the year listed, and the person owning or possessing same on that day shall list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with the same.

SEC. 4149: As soon as any taxpayer becomes delinquent the sheriff or the collector of the county where the property is liable shall distrain sufficient personal property of such delinquent, if found in the county, to satisfy all taxes, penalties, interest and penalties due. If a sufficient amount of personal property be not found, then he will levy on a sufficient quantity of the delinquent's land for that purpose. But if no land be found belonging to the delinquent, the sheriff shall levy on any real estate owned by the delinquent at the time of assessment for the taxes or a sufficient amount to satisfy the taxes, costs, and penalties due. If the sheriff makes illegal or unreasonable seizure and levy for taxes, he shall be liable in damages to the party aggrieved. A sheriff or tax collector shall sell for cash any property belonging to the delinquent taxpayer so levied upon or as much thereof as will pay the taxes due, penalties, interest and cost and his commission, in the same manner that property is sold under execution, except that the land shall not be valued, and shall be advertised by posting, for 15 days before the sale, a written or printed notice at the court house door, and by publication once a week for four consecutive weeks prior to the day of sale in a newspaper of general circulation, if there be one in the county; if not, then by printed hand bills posted for 15 days before the sale at the court house door and in three or more conspicu-

ous places in the taxing district; and he shall, not less than 15 days before the sale, mail to the delinquent a postal card addressed to his place of residence or place of business if such can be ascertained, notifying him of the time and place of sale; and in order to cover the cost of such advertisement and notification, the sheriff or collector shall have one dollar for each person whose property is advertised, to be paid by the delinquent, but in no event to be paid by the state, county or taxing district.

SEC. 4151-2 (In Part): When real estate is sold for taxes, if no one will bid for and purchase such real estate at the amount of tax, interest, penalty and cost, including the cost for advertising and the sheriff's or collector's commission, it shall be the duty of the sheriff or collector, to purchase the same for the state, county and taxing district having taxes against the delinquent for the amount of tax due, interest, penalty, costs and commissions thereon, and he shall make return to the county clerk as provided in Sec. 4162 of article 8, and the clerk shall certify same to the auditor of public accounts, and the sheriff or collector shall have credit for the amount of such tax due the state in the settlement with the auditor of public accounts. Provided, same are certified to the auditor of public accounts on or before the first day of June next after said tax became delinquent. The owner of such real estate, his representatives, heirs or assigns, shall have the right to redeem the same from the state, county and district or any other purchaser at the time within two years after the day of sale, by paying the purchase money, with interest at the rate of ten per centum (10%) per annum, and in addition fifteen per centum (15%) penalty upon the total amount of the purchase price and the amount of all costs. * * *

SEC. 4159: Deed by sheriff to purchaser: Fee. All conveyances of land sold for taxes shall be made in the name of the Commonwealth to the person entitled thereto. When the right to redeem shall have expired the sheriff or collector then in office (where the auditor of public accounts is not directed to make deeds of conveyance as provided in sec. 4154), shall convey to the purchaser the property described in his certificate of purchase, for which deed shall be allowed a fee of one dollar and fifty cents ($1.50), to be paid by the grantee in the deed."

FILED
JUL 13 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 122.

LILLEY CORNETT, - - - - - - - Petitioner,

versus

SWIFT COAL & TIMBER COMPANY, ET AL., - Respondents.

BRIEF FOR RESPONDENT, SWIFT COAL & TIMBER COMPANY, IN OPPOSITION.

SAMUEL M. WILSON,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 122.

LILLEY CORNETT, - - - - - *Petitioner,*

v.

SWIFT COAL & TIMBER COMPANY, ET AL., *Respondents.*

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR RESPONDENT, SWIFT COAL & TIMBER COMPANY, IN OPPOSITION.

May it please the Court:

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Kentucky is found on page 2 of the Record, and the Memorandum Opinion of the Circuit Court of Appeals is found on page 45 of the Record.

JURISDICTION.

Jurisdiction is invoked under U. S. C. A., Section 240(a).

QUESTIONS PRESENTED.

According to the petition (Paragraph XVII), the only questions presented would appear to be such as result from the lower court's refusal, as petitioner says, "to follow the law of Kentucky with reference to

"(a) The rights of prior lien holders;
(b) Jurisdictional validity of attachment proceedings; and
(c) Culpable laches."

Ignoring the informality of such attempted compliance with the rule requiring statement of questions presented, we assume that such questions might be stated by him as follows:

(a) The Court erred in holding that the petitioner merely acquired by virtue of his purchase at tax sale a prior and superior lien for the amount of his purchase price and interest, and that the attachment lien of Swift Coal & Timber Company, although it accrued after the assessment prior to the tax sale, was not extinguished but was simply subordinate to the lien of the tax purchaser, it being the contention of petitioner that the tax sale had the effect of extinguishing such attachment lien and vesting the purchaser with a fee simple and unencumbered title to the land.

(b) That the attachment proceedings of Swift were void for failure to comply with provisions of the Kentucky Code; and

(c) That owing to laches of Swift in enforcing its claim, it is now precluded from doing so.

Attention is called to the fact that in petitioner's brief filed in support of his petition question (c) is not argued. That is, no doubt, due to the complete answer to such charge of laches shown in the Record to the effect that the delay was due to the pendency of other litigation involving the same property between Cornett and other attaching creditors with whom Swift had made a compromise agreement and which, the District Court held, satisfactorily explained and necessitated the delay. See Record, pages 3, 37, 38 and 39.

It may be further noted that in such supporting brief for petitioner, argument is made on another question based on contention that the lower court by its refusal to follow and apply the laws of Kentucky deprived petitioner of property without due process of law contrary to the Fifth Amendment to the Constitution of the United States. Overlooking the novelty and insufficiency of such ground, thus broadly and vaguely stated, which is not supported by citation of authorities, it is assumed that the Court will not consider any other grounds than those mentioned in the petition, according to its rules and repeated decisions, and no further attention will be given to such question.

STATEMENT OF FACTS.

Supplementing the statement of petitioner, attention is called to the fact that said petitioner claims to be the owner in fee of the property involved in the case by virtue of a sheriff's sale for taxes held March 7, 1932, at which he purchased the property for $94.62. Swift had on July 23, 1930, prior to such sale, levied on the property an attachment for $23,000.00. Swift claimed to be a creditor of American Column & Lumber Company, which had the legal title to the property, in an amount in excess of $200,000.00 and had, moreover, contributed $11,760.50 to the purchase price of said lands.

In the District Court abundant evidence was introduced by Swift in support of its contention that the proceedings on which the tax deed was based were insufficient to pass title to the land or to do more than afford the purchaser a lien thereon for the amount of taxes paid by him, such deficiencies being—

(a) Insufficient description of land;
(b) Variance between the tax deed and prior proceedings; and
(c) Failure of sheriff to notify taxpayer, as required by Kentucky Statutes, Section 4149.

The District Court did not find it necessary to decide whether or not the proceedings were sufficient to pass good title to the land since it found that, according to Kentucky law the property being subject to the attachment lien of Swift, the sale for taxes did not oper-

ate to extinguish such lien, but gave to the purchaser a prior lien on the property for the amount of taxes paid by him.

The Circuit Court of Appeals, being thoroughly satisfied of the correctness of said ruling affording petitioner such prior lien and giving him all that he was entitled to, whether or not such proceedings were entirely regular, affirmed such ruling, no doubt deeming it unnecessary to render a labored or extensive opinion on such a clear proposition.

ARGUMENT.

It will be argued in opposition to the petition as follows, viz.:

1. The lower court correctly and strictly applied and adhered to the Kentucky law in deciding that the effect of the tax sale in question was merely to pass to the purchaser such title as the delinquent taxpayer had at the time of such sale, and which was subject to the then existing attachment lien of Swift, giving, however, to such purchaser a superior lien for the amount paid by him, plus interest at the rate prescribed by statute.

2. The attachment lien of Swift was not void for alleged failure to comply with procedural requirements of Kentucky Code, Section 196.

3. The case of Cornett v. Greever, 272 Ky. 241, 113 S. W. (2d) 1127, upon which petitioner apparently relies, has no application here.

I.

Assuming (Without Admitting) Entire Regularity of Proceedings to Support Tax Sale to Cornett, He Took Title Subject to Attachment Lien Which Was in Existence at Time of the Sale.

This is the ground upon which the judgment of the District Court was based, and upon which the Circuit Court was content to rest its affirmance.

The petitioner, however, contends in effect that the tax sale created in the purchaser a new title relating back to the date of assessment, rather than the date of sale, or even than the date of the levy required by the Statute (Section 4149) and extinguishes all liens or claims created subsequent to the assessment date.

This contention is not in accordance with Kentucky Statutes or decisions of its Court of Appeals, but is directly in their teeth.

The Kentucky law is well stated in Hall v. Hall, 174 Ky. 356, 192 S. W. 76, where the Court, at page 360 of the official report, says:

> "It must be conceded that the statute makes the lien for taxes paramount to all other existing liens and incumbrances, and that following a sale of real estate for the tax collectible thereon, and the failure of the owner to redeem the same within the two years allowed by law, a deed from the sheriff to the purchaser of the property at the tax sale vests in the latter what the statute declares a fee-simple title. But after all, the title so acquired is just such as the person against whom it was as-

sessed had. We have repeatedly held that the purchaser at a tax sale acquires only the title of the person against whom the land was assessed. Rogers v. McAlister, 151 Ky. 488, 152 S. W. 571; Eastern Ky. Coal Lands Corporation v. Commonwealth, 127 Ky. 700, 106 S. W. 260, 108 S. W. 1138, 32 Ky. Law Rep. 129, 33 Ky. Law Rep. 49. So the effect to be given a tax deed depends upon the construction that must be given the Kentucky Statutes authorizing the sale of lands for taxes, as the power to sell for taxes is purely statutory, and since, as already stated, the statutes of the state do not create in the purchaser at a tax sale a new title originating in the state and created by the tax sale, but authorize merely the transfer to the purchaser at the tax sale the title owned by the party against whom the assessment was made, it would be as inequitable to allow the title acquired by the purchaser at the tax sale under the deed from the sheriff to defeat a bona fide existing, prior lien upon the property as to permit it to be done by a purchaser under a deed from the former owner against whom the tax assessment was made. The statute does not declare in terms that the purchaser by virtue of the tax sale and deed from the sheriff shall take the land free of existing liens. Such a meaning to the statute could only be arrived at by inference, and such inference is not justified by its language or spirit. It is true section 4032 permits any person having a lien upon real estate to pay the taxes if the owner has failed to so do, and to be subrogated to the lien of the commonwealth, county, or district for such taxes; but this right is doubtless accorded as a means by which the lien holder may protect himself against

the paramount lien that would be acquired on the land by a purchaser thereof at its sale for the taxes. The statute does not, however, declare that the lienholder's failure to avail himself of this right will extinguish his lien if the property be sold for the taxes thereon and conveyed by the sheriff to the purchaser at such sale. The duty to keep the taxes paid upon the property devolves upon the owner. Tax sales are, it is true, advertised by the sheriff before the sale of the property, but this is to give notice to the owner of the property rather than to persons having liens thereon.

"It might with greater propriety be said that the purchaser at the tax sale is charged with the knowledge of a recorded lien *then* existing upon the property. But that fact would not defeat the paramount lien given by the statute for the tax and penalty paid by him in its purchase." (Emphasis ours.)

Attention is called to the word "then" appearing in the last quoted paragraph, as referring to the time of the *tax sale.*

And again (page 361):

"Whatever authority may be found elsewhere sustaining the contrary view, it has not been declared in this state to be the law that a tax sale is to be regarded as creating a new and independent title. On the contrary, we think it more consonant with reason to say that the effect of a tax sale and deed from the sheriff conveying the property to the purchaser at such sale only vests in the latter such title or interest therein as was held and owned by the person in whose name the property was assessed."

The same principles are recognized and affirmed in Smith v. Young, 178 Ky. 376, 198 S. W. 1166; Begley v. Boreing, 221 Ky. 619, 299 S. W. 551; Drane v. Graves, 261 Ky. 787, 88 S. W. (2d) 927; Vaughn v. Metcalf, 274 Ky. 379, 118 S. W. (2d) 727; and no authority will be found to the contrary.

Especial attention is directed to the case of Interstate Bond Co. v. Home Owners Loan Corporation, 282 Ky. 569, 139 S. W. (2d) 69, decided on March 1, 1940, and only recently published in the Kentucky Advance Sheets. This apparently is the latest pronouncement on the subject by the Kentucky Court of Appeals and fully confirms what we have said in this section. We quote from the opinion in this case on page 571 of the official reports:

> "In Drane v. Graves, 261 Ky. 787, 88 S. W. (2d) 927, Faust v. Louisville Trust Co., 192 Ky. 3, 232 S. W. 58, and Hall v. Hall, 174 Ky. 356, 192 S. W. 76, it is held that a tax deed executed at the end of the two-year redemption period as provided in Kentucky Statutes, section 3004, does not wipe out a mortgage lien. The substance of those decisions was that the holder of the tax deed takes a fee simple title to the property, *subject to existing mortgage liens,* which liens are in turn subordinate to the paramount lien given the holder of the tax deed to the property for the amount of the tax, statutory penalties and interest paid by the holder therefor. We do not deem it necessary to decide whether or not a mortgagee has a right to redeem property as against a tax purchaser to whom a tax deed has been executed at the end of

the two-year redemption period since HOLC is not seeking to redeem but is only seeking to assert its mortgage lien which it has a right to do under the authorities cited above. As a matter of fact, HOLC in its pleadings nowhere claimed a right to redeem the property and Interstate by its answer and cross petition prayed to be adjudged the owner of the fee simple title under its tax deed. Further, the two-year period allowed for redemption had passed and a tax deed for the property was held by Interstate." (Emphasis ours.)

In Paragraph VIII of the Petition for Certiorari it is said that the lower courts, "refusing to follow and apply the law of Kentucky held that the only right which petitioner had was a paramount lien against the lands to reimburse him for the amount he had paid the Sheriff of Letcher County when he purchased at the tax sale and held that this lien was not superior to the lien of Swift, although the lien of Swift was acquired twenty-two days after the tax lien had attached to these lands." The same contention is made in the Supporting Brief, page 12.

It was not held that Swift's lien was superior to Cornett's but the latter was held to be superior. Nor was Cornett limited to his lien for his purchase price, but he was adjudged to have title subject to Swift's lien.

Petitioner ignores the fact that the tax sale was made pursuant to a levy after delinquency, under Kentucky Statutes 4149, as under execution; also the fact

that while the assessment is made as of, and relating back to July 1st, it was actually not made until late in October, and until such later date there was no lien for the taxes.

He also overlooks the fact that such a tax sale does not extinguish other liens on the property. None of his cited cases supports the contention that liens existing at the time of sale, although created after the assessment date, are *extinguished* by the sale, and it is submitted that none can be found.

It is the general rule, and the rule in Kentucky, that in proceedings to enforce a prior lien, to which the holder of a junior lien is not made a party, such junior lien is not extinguished but the holder may still have relief, redeeming from such sale, etc. Com. v. Robinson, 96 Ky. 553, 29 S. W. 306; Gault v. Equitable Trust Co., 100 Ky. 578, 38 S. W. 1065.

Of course, if the junior lienholder is a party to the proceedings his lien is extinguished by a proper sale to enforce the prior lien. It is clearly recognized, however, that a sale for taxes in Kentucky, being summary and *ex parte* does not have such effect, as is shown by the following excerpt from Drane v. Graves, 261 Ky. 787, 793, 88 S. W. (2d) 927, viz.:

> "* * * a sale of property for the purpose of enforcing tax liens was never regarded as a proper proceeding for the enforcement of prior contractual liens upon the same property, and the purchaser at the sale of property so encumbered took it subject to the lien of such encumbrance but with

a prior lien for the amount he had paid with interest, penalties," etc.

To the same effect is Faust v. Louisville Trust Company, 192 Ky. 3, 232 S. W. 58.

II.

The Attachment Lien of Swift Was Not Void for Alleged Failure to Comply With Procedural Requirements of Kentucky Code, Section 196.

Section 196, of the Kentucky Code, requires that for an order of attachment to be made by the Clerk an affidavit containing certain statements must be filed. It was long ago decided in Kentucky and is still the rule that it is unnecessary to file a separate affidavit if the statements are made in the petition and the petition is verified. Scott v. Doneghy, 17 B. Mon. 321; Franklin Savings Inst. v. Bank of Wheeling, 1 Metc. 156; Worthington v. Carey, 1 Metc. 470; Burnam v. Romans, 2 Bush, 191.

Out of an abundance of precaution in the present case, both of the above methods were used. The affidavit is copied in full in the Record on pages 26 and 27, and the Amended Bill in Equity is so copied on pages 27 and 28. We submit that the Amended Bill, as verified, by itself alone, meets every requirement prescribed by the Kentucky Code, and when the two instruments are read together it is difficult to see how anything further could be added.

Petitioner contends that neither the affidavit nor Amended Bill complies with the requirement of the Code that there shall be shown "the sum which the affiant believes the plaintiff ought to recover" (Petition, Paragraph X, page 4; Brief for Petitioner, page 13).

In the Amended Bill it is said (Record 28) "the plaintiff ought to recover a sum greatly in excess of the value of the defendant's property in this state, to-wit: at least $204,552.39, but the plaintiff asks an attachment herein upon only $23,000.00 of its claim," etc.

In the jurat it is stated that the affiant "believes the facts alleged in the foregoing amended bill in equity are true." This was properly held to be a substantial compliance with the requirements of the Code.

Thus we find a positive statement in the body of the pleading, and the "belief" that it is true, stated in the jurat. That such a method of setting out said statement fully complies with the Code provision is settled by the Kentucky decisions.

The case of Colovas v. Allen Motor Co., 242 Ky. 93, 45 S. W. (2d) 809, contains the following statement:

> "The facts necessary to procure an attachment must be charged directly and positively and not on belief or information and belief. Where the affidavit states that the affiant believes the facts therein, but is sworn to as true and not on belief merely, or where the affidavit states the facts directly, and it is sworn to on information and belief, it is in either instance sufficient. Williams v. Martin, 1 Metc. 42; Ryon v. Bean's Admr., 2 Metc. 137."

The law does not require that the exact language of the Code be used. As said in Lincoln Bank & Trust Company v. Arnold, 256 Ky. 80, 75 S. W. (2d) 751:

> "We are not unmindful of the rule that a reasonably strict compliance with the Code must be had relating to attachments and other summary proceedings. But this rule does not mean that the exact words used in the Code must always be resorted to, when there is other language used conveying the same meaning and where the intention and purpose of the parties are obvious."

The request for an attachment on only $23,000.00 is not inconsistent with the requirements of the Code, and would seem to have been dictated by considerations of common sense, as it would have been obviously fruitless to levy an attachment for more than $200,000.00 on property known to be worth less than one-eighth of that sum and unnecessarily burdensome to give the bond which would be required therefor.

None of the cases cited by petitioner supports his claim as to the insufficiency of such allegations, and surely it cannot be said that any of them support his claim that they are so deficient as to affect the jurisdiction of the Court.

Furthermore, no summons was necessary on the Amended Bill or supplementary proceedings for attachment. See Moore's Admr. v. Sheppard, 1 Metc. (Ky.) 97; Fremd v. Ireland (1895), 17 Ky. Law Rep. 1140, 33 S. W. 89.

III.

The Case of Cornett v. Greever, Et Al., 272 Ky. 241, 113 S. W. (2d) 1127, Has No Application Here.

In the petition for certiorari (Paragraph VII) it is said that the validity of the tax deed was before the Kentucky Court of Appeals in the above case, "and was there upheld as a valid conveyance to Cornett of the fee simple title to these lands." None of these respondents was party to or bound by said decision, and the evidence there adduced was in material respects different from that in this case (Record, pages 13, 31, 32). That case was a controversy between Cornett and certain attaching creditors who had obtained a commissioner's deed. The Court found their attachments, and consequently their deed, void (on grounds other than those charged by petitioner herein) and there being no other claimants of the property before the Court it had no jurisdiction to adjudge anything further, and anything it said on this point was clearly *obiter*.

As stated in brief for petitioner (page 19) the question of the effect of the tax sale on an existing lien on the land was not discussed in the opinion, but it will be noted that when the Court of Appeals of Kentucky first decided that case in favor of such attaching creditors (which decision was later withdrawn on rehearing), it held in accordance with Hall v. Hall (*supra*) that the tax title was subject to the attachment liens, with superior lien in the purchaser to the extent of

taxes and costs paid by him (Record, page 31); and its second and final opinion held nothing to the contrary.

Under such circumstances, the opinion in that case has not even the effect of *stare decisis* in this case.

CONCLUSION.

It is submitted that the decision of the Circuit Court is proper and that no reasonable ground exists for the review sought.

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